Filed 11/27/18 Oakdale Groundwater Alliance v. Oakdale Irrigation Dist. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

OAKDALE GROUNDWATER ALLIANCE, et al.,

Plaintiffs and Respondents,

v.

OAKDALE IRRIGATION DISTRICT,

Defendant and Appellant;

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY et al.,

Real Parties in Interest.

F076288

(Super. Ct. No. 2019380)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

O'Laughlin & Paris, Tim O'Laughlin, Valerie C. Kincaid, and Timothy J. Wasiewski for Defendant and Appellant.

Soluri Meserve, Osha R. Meserve, and Patrick M. Soluri for Plaintiffs and Respondents.

No appearances for Real Parties in Interest.

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INTRODUCTION

Oakdale Irrigation District (District) appeals from a judgment of the Stanislaus County Superior Court granting the writ petition of Oakdale Groundwater Alliance, Louis F. Brichetto, and Robert N. Frobose (collectively, Alliance)[1] and the court's order denying a motion to vacate said judgment.

Created in 1909, District holds water rights to and diverts water from the Stanislaus River for distribution and use within its 64,000-acre service area. It operates and maintains over 330 miles of laterals and pipelines; 110 miles of drains; 40 miles of main canals; 22 deep well pumps; and 43 reclamation pumps. On March 15, 2016, District approved the "One-Year Pilot On-Farm Water Conservation Program and Transfer of Consumptive Use Water" (Project). Pursuant to the Project, participating landowners within District's service area would fallow up to 3,000 acres of farmland during the 2016 irrigation season, potentially conserving up to 9,000 acre-feet of water. This water would be transferred to the real parties in interest—San Luis & Delta-Mendota Water Authority and State Water Contractors[2]—in exchange for funds to finance the implementation of water conservation measures on the fallowed land. District concluded the Project would have no significant effect on the environment.

Alliance, an unincorporated association, petitioned for a peremptory writ of mandamus directing District to vacate and set aside its approval of the Project and prepare an environmental impact report (EIR) in accordance with the California

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[1] Brichetto and Frobose reside, farm, and own property "within the Oakdale Community." Both are Alliance members.

[2] San Luis & Delta-Mendota Water Authority consists of water agencies representing federal and exchange water service contractors within the western San Joaquin Valley, San Benito, and Santa Clara counties. State Water Contractors represents the common interests of multiple public water supply agencies in California.

Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)[3] and its accompanying Guidelines.[4] Following a hearing on the matter, the court granted the petition and entered a judgment in favor of Alliance. District unsuccessfully moved to vacate the judgment on the basis of mootness.

On appeal, District argues it did not need to prepare an EIR because there was no substantial evidence in the administrative record supporting a fair argument that the Project may have a significant effect on the environment; its initial study/negative declaration adequately described the Project and baseline physical conditions; and the superior court erroneously denied its motion to vacate the judgment. We reject these contentions and affirm the judgment. There was substantial evidence in the record supporting a fair argument that the Project may have a significant effect on biological resources and air quality.[5] In addition, District's initial study/negative declaration was defective: it did not sufficiently describe the Project as a whole or baseline physical conditions.[6] Finally, the court's denial of District's motion to vacate judgment was not improper.

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[3] Unless otherwise indicated, subsequent statutory citations refer to the Public Resources Code.

[4] The Guidelines refer to California Code of Regulations, title 14, section 15000 et seq. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2 (*Laurel Heights*).) They are authorized by CEQA (§ 21083) and accorded great weight in interpreting the statute except where they are clearly unauthorized or erroneous (*Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907, fn. 3).

[5] On appeal, the parties also address the question of whether the Project may have a significant effect on groundwater. In view of our disposition, we need not address this point.

[6] On appeal, the parties also address the question of whether the initial study/negative declaration segmented the Project. In view of our disposition, we need not address this point.

FACTUAL AND PROCEDURAL HISTORY

I. Initial study/negative declaration.

In January 2016, District prepared an initial study/negative declaration "to examine the potential direct, indirect, and cumulative impacts associated with [its] proposal to assist landowners in implementing on-farm water conservation measures on no more than 3,000 acres of farmland in [District's service area], and to transfer the water that would have been consumptively used to the San Luis [&] Delta[-]Mendota Water Authority . . . and State Water Contractors . . . south of the Delta to pay for the program." The first four sections read in part:

> "**SECTION 1 [¶] Introduction [¶] . . . [¶]**
>
> "**1.2 Purpose and Need/Project Objectives**
>
> "[District's] [l]andowners . . . must become compliant with [Senate Bill] [X]7-7[, i.e., the Water Conservation Act of 2009].[7] As the recent drought has shown, increased water conservation is an on-going responsibility and obligation of every water user in the state. [San Luis & Delta-Mendota Water Authority] and [State Water Contractors] south of the Delta are willing to pay $400 an acre-foot . . . for every acre-foot of saved water. . . . District estimates an average of approximately 3.0 [acre-feet] of saved water per acre based on the evapotranspiration of applied water (ET_{AW}), depending on the existing crop type. This will allow [District's] landowners . . . to spend up to $1,140 an acre to implement on-farm water conservation methods to become compliant with [Senate Bill] [X]7-7. Participant landowners that do not currently have a measurable delivery meeting the standards of [Senate Bill] [X]7-7 will be required to use the Pilot On-Farm Water Conservation Program funding first to install a measurable delivery to ensure compliance with [Senate Bill] [X]7-7 moving forward. The ET_{AW} from the [P]roject is estimated at this time. Part of the pilot program will be to implement a methodology for quantification of the ET_{AW} of pasture in [District's service area]. . . .
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> "Water made available under the Pilot On-Farm Conservation Program would be released during the April/May pulse flow time period . . . . The release would be done in consultation with [the United States Bureau of]

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7 Water Code section 10608 et seq.

Reclamation, National Marine Fisheries Service . . . , California Department of Fish and Wildlife and [San Luis & Delta-Mendota Water Authority] and [State Water Contractors].

"**1.3 Scope/Project Location and Setting**

"This Initial Study analyzes the potential environmental impacts of the proposed one-year Pilot On-Farm Water Conservation Program and water transfer of up to 9,000 [acre-feet] of . . . water to the [San Luis & Delta-Mendota Water Authority] and [State Water Contractors] south of the Delta.

"While the distribution of the transferred consumptive use water is beyond the breadth of [District's service area], the recipients of the water would be the [San Luis & Delta-Mendota Water Authority] and the [State Water Contractors] south of the Delta. On-farm water conservation measures implemented as part of the Proposed Project would take place on land within [District's service area].

"**1.4 Potential Environmental Issues**

"This Initial Study analyzes the affected environment of the Proposed Pilot Project in order to determine the potential and cumulative impacts on the following resources: [¶] . . . Water Resources[;] [¶] . . . Land Use[;] [¶] . . . Air Quality[;] [¶] . . . Global Climate Changes[;] [¶] . . . Biological Resources[;] [¶] . . . [and] Cultural Resources.

"**SECTION 2 [¶] Alternatives and Proposed Project** [¶] . . . [¶]

"**2.1 No Project Alternative**

"Under the No Project Alternative, landowners would not idle their lands and [District] would deliver water to those lands. No water would be transferred.

"**2.2 Proposed Project**

"[District] intends to conduct a one-year . . . Pilot On-Farm Water Conservation Program. Up to, but not to exceed, 3,000 acres in [District's service area] could opt not to be delivered water during the 2016 irrigation season. Up to 9,000 [acre-feet] of ET_{AW} water would be saved by the lands participating in the pilot program. Based on the ET_{AW} of the crop, the water saved would be transferred to [San Luis & Delta-Mendota Water Authority] and [State Water Contractors] to pay for the on-farm water

conservation measures. The lands participating in the program would be back in production in water year 2017.

"The transfer water would be released from Goodwin Dam into the Stanislaus River, flow into the San Joaquin River and the south Delta, and would be diverted and pumped at the [Central Valley Project] and [State Water Contractors] facilities. The Proposed Project may include obtaining a Warren Act Contract for the diversion and conveyance of some or all of the water at the Jones Pumping Plant and in the Delta-Mendota Canal and San Luis Reservoir. [¶] . . . [¶]

"**SECTION 3 [¶] Affected Environment and Environmental Consequences** [¶] . . . [¶]

"*Air Quality* – New Melones [Reservoir] (releases from Goodwin Dam on the Stanislaus River) resides within the Mountain Counties Air Basin. There would be no emission of criteria pollutants that would cause detectable changes to the baseline conditions or exceed federal, State, and local thresholds for the Mountain Counties Air Basin, as the releases are part of normal operations and do not require new construction. [¶] . . . [¶]

"**3.2 Biological Resources**

"**3.2.1 Affected Environment**

"**Terrestrial Habitat.** Agricultural land uses (primarily pasture, orchards, corn/oats, rice) within . . . [District's] service area totaled 64,725 acres in 2014. In general, these lands provide minimal habitat for terrestrial species given their agricultural use, particularly those lands that are used to grow row and orchard crops. [¶] . . . [¶]

"**3.2.2 Environmental Consequences** [¶] . . . [¶]

"**Terrestrial Habitat.** Under the Proposed Action, up to 3,000 acres of agricultural lands could be idled for one year. Wildlife that use agricultural lands are not anticipated to be adversely affected by this short-term change in land use given the minimal habitat available on such lands and that less than 5 percent of [District]-irrigated agricultural lands would be subject to land idling, leaving limited habitat available on approximately 60,000 acres. [¶] . . . [¶]

"**3.5 Cumulative Effects**

". . . [A] cumulative impact is defined as 'two or more individual effects which, when considered together, are considerable or which compound to

increase other environmental effects.' Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

"[The United States Bureau of] Reclamation's action is to accommodate the request by [District] to release water down the Stanislaus River to [San Luis & Delta-Mendota Water Authority] and [State Water Contractors] water users. Release of additional water into the Stanislaus River will not result in declines in reservoir storage or the benefits associated with carryover storage. There are no additional projects identified for this water year.

"**SECTION 4 [¶] Statement of Findings and Determination**

"[District] conducted this Initial Study to evaluate the potential impacts of implementing the proposed [P]roject. The proposed [P]roject has been designed to avoid any potentially significant environmental effects identified; therefore, the preparation of an [EIR] is not required. [¶] . . . [¶]

"In light of the whole record, there is no substantial evidence that the proposed [P]roject would have a significant effect on the environment. If substantial changes alter the character or impacts of the proposed [P]roject, an additional environmental impact determination would be necessary.

"Pursuant to [s]ection 21082.1 of . . . CEQA, [District] has independently reviewed and analyzed the Initial Study and Negative Declaration for the proposed [P]roject and finds that these documents reflect the independent judgment of [District]. It has been determined that the [P]roject COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION has been prepared. No mitigation measures are required."

Section 6 of the initial study/negative declaration, titled "**Environmental Factors Potentially Affected**," presented several checklists detailing the Project's possible impacts on certain aspects of the environment. Questions in the "**Air Quality Checklist**" asked whether the Project would "[c]onflict with or obstruct implementation of the applicable air quality plan"; "[v]iolate any air quality standard or contribute substantially to an existing or projected air quality violation"; "[r]esult in a cumulatively considerable net increase of any criteria pollutant for which the [P]roject region is non-attainment under an applicable federal or state ambient air quality standard (including releasing

emissions which exceed quantitative thresholds for ozone (O3) precursors)"; "[e]xpose sensitive receptors to substantial pollutant concentrations"; and/or "[c]reate objectionable odors affecting a substantial number of people." For each question, District marked the box "**No Impact**." It added:

> "Participating landowners would be responsible to adhere to existing air quality regulations as they idle and undertake any on-farm water conservation measures on their property. The transferred water would be utilized by [San Luis & Delta-Mendota Water Authority] and [State Water Contractors] members on existing farmland that is currently under agricultural production, and therefore it would not cause an increase in air pollutants."

Questions in the "**Biological Resources Checklist**" asked whether the Project would "[h]ave a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Wildlife . . . or [United States] Fish and Wildlife Service"; "[h]ave a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, and regulations or by the [California Department of Fish and Wildlife] or [United States Fish and Wildlife Service]"; [h]ave a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act . . . (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means"; "[i]nterfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites"; "[c]onflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance"; and/or "[c]onflict with the provisions of an adopted Habitat Conservation Plan . . . , Natural Community Conservation Plan, or other approved local or regional [Habitat Conservation Plan]." For each question, District marked the box "**No Impact**." It added:

"The participating landowners would be responsible to adhere to existing regulations for the protection of wildlife habitat and wetlands during implementation of their on-farm water conservation measures."

"**Appendix A**" of the initial study/negative declaration contained a document titled "**PROPOSED PILOT PROGRAM (DRAFT) [¶] ON-FARM CONSERVATION FUNDING PROGRAM**." The document identified the following as "**Approved Water Conservation Practices**":

- "● Pipelines that replace open ditches. Includes all associated parts.
- "● Pipelines that replace old pipelines. Includes all associated parts.
- "● Laser land leveling with sub-soiling and reseeding.
- "● Tail-water Recovery or Pump-back systems. Includes pump and electrical.
- "● Land conversions from high water use crops to lower water use crops.
- "● Conversion to higher efficiency irrigation systems.
- "● Conservation Practice monies to small parcel may be applied to actual costs of lowering, replacement or deepening of domestic wells impacted by 4 years of drought."

II. Comments and responses.

On January 15, 2016, District submitted a notice of intent to adopt a negative declaration and a copy of the initial study/negative declaration to various public agencies via direct mailing and/or the State Clearinghouse. The review period commenced on January 20, 2016, and ended on March 14, 2016.

a. *California Department of Fish and Wildlife*

California Department of Fish and Wildlife's letter dated March 14, 2016, read in part:

"The . . . Project . . . boundary and surrounding areas are known to support several species which are considered threatened or endangered under the California Endangered Species Act . . . and/or federal Endangered Species Act . . . , and other special status species, including, but not limited to, State threatened Swainson's hawk . . . ; State candidate species tricolored blackbird . . . ; federally threatened steelhead . . . ; State Species of Special Concern fall-run Chinook salmon . . . ; State and federal threatened California tiger salamander . . . ; federal endangered vernal pool tadpole shrimp . . . ; federal threatened vernal pool fairy shrimp . . . ; federal threatened Valley elderberry longhorn beetle . . . ; State Species of Special Concern burrowing owl . . . ; State Species of Special Concern western pond turtle . . . ; State and federal endangered Hartweg's golden sunburst . . . ; State rare plant rank 1B.3 beaked clarkia . . . ; and State rare plant rank 2B.2 dwarf downingia . . . . Focused biological surveys should be conducted by qualified biologists during the appropriate survey period(s) to determine if these species are present and if they could be impacted by the proposed Project, including potential crop/pasture idling activities and installation of new irrigation equipment. Survey results can then be used to identify any mitigation, minimization, and avoidance measures that should be included in the [CEQA] document prepared for this Project and any permits needed.

"The Department has concerns about the Project-related impacts to the surface water, riparian, wetland, and upland habitats that are adjacent to or within the Project site, as well as the associated impacts to species that utilize these habitat types. In order to comply with State laws . . . , Project-related impacts to these special status biological resources should be evaluated and addressed prior to Project implementation. Without accurate identification of the type and extent of sensitive resources, as well as potential effects on those resources, it is not clear what evidence [District] utilized to make findings that no impacts would occur to biological resources. Therefore, the Department recommends that biological surveys be conducted by a qualified wildlife biologist and botanist during the appropriate season(s) and that the results of these surveys are used to inform the analysis of impacts to resources and to provision suitable avoidance, minimization, and mitigation measures to reduce impacts to less than significant levels.

"Moreover, revisions to the [initial study]/[negative declaration] should be made that include an accurate description of proposed Project development activities, a discussion regarding pre-existing grading and structural development in connection with Project design plans (including, but not limited to[:] irrigation systems development), and an appropriate

discussion of biological resources located within the Project area identified through biological surveys as discussed above. The CEQA document should include a Project description sufficient to accurately identify impacts to wildlife species and habitat, including a discussion of potential impacts to sensitive species that may have already occurred as a result of previous unpermitted land disturbance activities in association with the Project, and measures which would mitigate impacts to such species to a level of less than significant. Therefore, the Department recommends a new CEQA document be prepared and re-circulated for review once adequate surveys and impact analyses have been completed to determine what measures would mitigate potential effects of the Project. [¶] . . . [¶]

"**The Department offers the following comments regarding the Project:** [¶] . . . [¶]

"● Several State-listed plant and animal species, including the State threatened California tiger salamander and State threatened Swainson's hawk have been documented within [District's service area] boundary. The tricolored blackbird is a State candidate for listing and has also been documented in the area. The Department has regulatory authority over projects that could result in the take of any species listed by the State as threatened or endangered, or designated as a candidate for listing, pursuant to Fish and Game Code [s]ection 2081. If changes in land use, infrastructure development, or other impacts resulting from the Project could result in the take of any species pursuant to [the California Endangered Species Act], the Department may need to issue an [incidental take permit] for the Project. Issuance of an [incidental take permit] and/or [lake or streambed alteration agreement] by the Department is considered a 'project' . . . and is subject to CEQA.

"● **Biological Information:** It is not clear how [District] concluded that there will be no impacts to biological resources when the [initial study] does not analyze whether the Project would have adverse effects on any candidate, sensitive, or special status species. There is no discussion regarding the potential for the above mentioned species to occupy the site, including California tiger salamander, Swainson's hawk, and tri-colored black bird. Based on the information provided in the [initial study]/[negative declaration] it appears that biological surveys have not been performed on the Project site. The [initial study]/[negative declaration] states that the land idled during the one-year pilot program would be existing farmland with limited wildlife habitat. Again, absent the completion

of essential biological assessments and surveys to determine which species have the potential to occupy or use the Project site, it is not clear how [District] can conclude that biological resources are either not present or that measures proposed are adequate to reduce impacts to less than significant. As required by CEQA, the [initial study]/[negative declaration] should clearly identify resources on the Project site and their potential to be impacted by the proposed Project; analyze potential impacts as to their significance; and identify measures to reduce all potentially significant impacts to a level of less-than-significant. Impact analysis should be predicated on complete biological surveys. Measures and alternatives that would avoid and minimize potential impacts to resources of concern, as well as mitigation measures, should be provided.

"The Department advises that surveys be conducted at the appropriate time of year to determine the presence/absence, location, and abundance of sensitive plant and animal species and natural communities that may occur on or adjacent to the Project site. In addition to the specific surveys that we have recommended below, general wildlife surveys should be conducted over the entire Project site to determine potential impacts to wildlife species and habitats of concern. Sensitive natural communities that may occur on the Project site are also advised to be identified and mapped and potential impacts evaluated and mitigated.

"● **Swainson's Hawk:** It is unclear from the Project description what crop types will actually be idled. The calculations for $ET_{[AW]}$ are based on idling of up to 3,000 acres of pasture. Pasture and alfalfa are examples of crop types that provide suitable foraging habitat for Swainson's hawk during the nesting and non-nesting season in California's Central Valley.

"This State threatened species has the potential to nest in trees within and adjacent to the . . . Project . . . boundary. To evaluate potential Project-related impacts, the Department recommends that a qualified wildlife biologist conduct surveys for nesting raptors following the survey methodology developed by the Swainson's Hawk Technical Advisory Committee . . . prior to Project implementation.

"Because Project implementation is scheduled for the current irrigation season of 2016, the Department recommends immediate surveys for active Swainson's hawk nests conducted by a qualified biologist. A minimum no-disturbance/no-construction buffer of 0.5 miles is advised and should be delineated around active nests until

the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or parental care for survival.

"If Swainson's hawk nests occur in/near the Project vicinity, the Department recommends a compensation for the loss or conversion of Swainson's hawk foraging habitat as described in the Department's *Staff Report Regarding Mitigation for Impacts to Swainson's Hawks* . . . to reduce impacts to foraging habitat to less than significant. The Staff Report recommends that mitigation for habitat loss occur within a minimum distance of 10 miles from known nest sites. The Department has the following recommendations based on the Staff Report:

"1. For projects within 1 mile of an active nest tree, a minimum of one acre of habitat management . . . land for each acre of idled cropland is advised.

"2. For projects within 5 miles of an active nest but greater than 1 mile, a minimum of 0.75 acres of [habitat management] land for each acre of idled cropland is advised.

"3. For projects within 10 miles of an active nest tree but greater than 5 miles from an active nest tree, a minimum of 0.5 acres of [habitat management] land for each acre of idled cropland is advised.

"● **California Tiger Salamander** . . . **:** The State-listed threatened [California tiger salamander] has the potential to be present on or adjacent to suitable habitat located within the . . . Project . . . boundary, and the Department has jurisdiction over this species under [the California Endangered Species Act]. It is unclear from the Project description whether pasture, non-native grassland, and vernal pool habitat containing suitable [California tiger salamander] breeding and upland habitat will be utilized for the Project. It is also unclear from the Project description whether the Project will result in ground-disturbing activities to suitable [California tiger salamander] habitat. Aerial photographs show that suitable upland refugia and wetland breeding habitat for [California tiger salamander] exists within the Project site. The California Natural Diversity Database . . . has occurrence records located within [District's service area] boundary. The Department believes this species could be potentially impacted if ground disturbance such as

discing, ripping, or grading were to occur as the result of the Project and the appropriate avoidance, minimization, and mitigation measures are not implemented.

"Prior to **<u>any</u>** ground-disturbing activities, the Department requests potential Project-related impacts to this species in and surrounding the Project footprint be evaluated by a qualified biologist using the *Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander* which were issued by the Department and the [United States Fish and Wildlife Service] in 2003. The protocol requires that surveys be conducted during at least two seasons, with sufficient precipitation, to be considered complete. If [California tiger salamander] are found on the Project site, take authorization would occur through the issuance of an [i]ncidental [t]ake [p]ermit . . . , pursuant to Fish and Game Code [s]ection 2081[, subdivision](b). In the absence of protocol surveys, the applicant can assume presence of [California tiger salamander] within the Project area and immediately focus on obtaining an [incidental take permit]. . . . Included in the [incidental take permit] would be measures required to avoid and/or minimize direct take of [California tiger salamander] on the Project site, as well as measures to fully mitigate the impact of the take.

"● **United States Fish and Wildlife Service . . . & National Marine Fisheries Service . . . Consultation:** The Department recommends consultation with the [United States Fish and Wildlife Service] and [National Marine Fisheries Service] prior to any ground disturbance related to this Project due to potential impacts to federally listed species. Take under [the federal Endangered Species Act] is more stringently defined than under [the California Endangered Species Act]; take under [the federal Endangered Species Act] may also include significant habitat modification or degradation that could result in death or injury to a listed species, by interfering with essential behavioral patterns such as breeding, foraging, or nesting. Consultation with the [United States Fish and Wildlife Service] and [National Marine Fisheries Service] in order to comply with [the federal Endangered Species Act] is advised well in advance of Project implementation."

District responded:

"The participating parcels are currently under agricultural production, and will be returned to agricultural production at the end of the Project. The

Project will not involve any change in land use or infrastructure development. Issuance of an [incidental take permit] or [lake or streambed alteration agreement] will not be required as part of the Project.

". . . On-farm water conservation measures performed as a result of the Project will be done on private property by the landowners. [District] does not have jurisdiction over improvements on private property, and therefore the participant landowners will be responsible for obtaining any biological surveys.

". . . Any nesting surveys for Swainson's hawks will be the responsibility of the participant landowner.

". . . Any ground-disturbing activities will take place on private property as part of water conservation measures. It will therefore be the responsibility for the participant landowners to have any [California tiger salamander] surveys conducted."

b. *Brichetto and Frobose.*

Brichetto and Frobose—through their attorney—submitted a March 14, 2016, letter, which read in part:

"**II. <u>Substantial evidence supports a 'fair argument' that the [P]roject may have significant adverse impacts on the environment.</u>** [¶] . . . [¶]

"***A. The [initial study]/[negative declaration]'s project description is incomplete . . . .***

"An accurate, stable and finite project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity. [Citations.] . . . The [initial study]/[negative declaration]'s project description fails to comply with this mandate.

"The [initial study]/[negative declaration]'s Purpose and Objectives Section states that Project[] will allow landowners to spend up to $1,140 an acre to implement on-farm water conservation methods to become compliant with [Senate Bill X]7-7. . . . The [initial study]/[negative declaration], however, does not describe . . . any aspect of [the] On-Farm Water Conservation Program, which could have adverse environmental impacts themselves. . . . Instead, the [initial study]/[negative declaration]'s Project Description is limited to a discussion of the water transferred as part of the Project. This incomplete description of the Project violates CEQA.

More importantly, as a result of curtailing its description of the Project, the [initial study]/[negative declaration] fails to discuss any potential impacts of the On-Farm Water Conservation Program. For example, funds from the Project can be used to replace open ditches with pipelines. Funds can also be used to replace and deepen existing domestic water wells. The [initial study]/[negative declaration] fails to address both construction and operational impacts from the use of the Project's funds for these purposes. [¶] . . . [¶]

"The [initial study]/[negative declaration] fails to provide sufficient project description to allow the Board or public to meaningfully evaluate the Project's potential impacts.

"***B. The baseline used in the [initial study]/[negative declaration] is inadequate.***

"Before the impacts of a project can be assessed and mitigation measures considered, an initial study must describe the existing environment. . . . It is only against this baseline that any significant environmental effects can be determined. . . . [¶] . . . [¶]

". . . [T]he [initial study]/[negative declaration] fails to describe the baseline conditions relevant to the analysis of significant effects. . . . [¶] . . . [¶]

"***F. The Project May Have Significant and Unmitigated Air Quality Impacts.***

"The [initial study]/[negative declaration] includes a total of *four* sentences regarding potential air quality impacts from the Project . . . . [¶] . . . [¶] Nowhere in the [initial study]/[negative declaration] does [District] cite to *any* study, data, or background information to support [its] flippant conclusions. What's more, the [initial study]/[negative declaration] ignores a number of critical factors in its 'analysis.' For example, the document briefly discusses the Mountain Counties Air Basin, where water releases would occur, but does not describe or analyze the potential air impacts in the San Joaquin Valley Air Pollution Control District . . . , where agricultural land would be fallowed. The [San Joaquin Valley Air Pollution Control District] is currently designated nonattainment for ozone and $PM_{[2.5]}$, and for $PM_{[10]}$ pursuant to federal standards. . . . As was recognized by the San Luis & Delta-Mendota Water Authority . . . , '[w]ater transfers via cropland idling would increase fugitive dust emissions from wind

erosion of bare fields. . . .'[8] Thus, the air quality analysis in that EIR [identified] potential impacts in 'counties where cropland idling could occur' in addition to 'counties overlying groundwater basins where groundwater substitution transfers could occur, and counties where

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8 The letter cites a "**Long-Term Water Transfers** [¶] **Environmental Impact Statement/Environmental Impact Report** [¶] **Final**" prepared by the United States Department of the Interior Bureau of Reclamation Mid-Pacific Region and the San Luis & Delta-Mendota Water Authority in March 2015, excerpts of which are included in the administrative record. While the excerpts do not contain the passage quoted in the letter, it contains the following language:

"**Section 3.5** [¶] **Air Quality** [¶] . . . [¶]

"Groundwater substitution and cropland idling transfers would affect air quality in the area of analysis. . . .

"**3.5.1 Affected Environment/Environmental Setting** [¶] . . . [¶]

"**3.5.1.1 Area of Analysis**

"The area of analysis for air quality includes counties where cropland idling could occur in the Seller Service Area, counties overlying groundwater basins where groundwater substitution transfers could occur, and counties where transferred water would be used for agricultural purposes in the Buyer Service Area. . . .

"**3.5.2 Environmental Consequences/Environmental Impacts** [¶] . . . [¶]

"**3.5.2.1 Assessment Methods**

"Groundwater substitution could increase air emissions in the Seller Service Area by increased exhaust emissions from groundwater pumping or by increased fugitive dust emissions by cropland idling. Cropland idling transfers could reduce vehicle exhaust emissions but increase fugitive dust emissions. . . . [¶] . . . [¶]

"For the purposes of general conformity, the nonattainment or maintenance area is defined as an area designated as nonattainment or maintenance under section 107 of the [federal Clean Air Act] and described in [Code of Federal Regulations, title]40 [section] 81.305 for California. The nonattainment area varies by pollutant and the area's designation and classification. The nonattainment and maintenance areas included in this analysis for the Sellers Service Area . . . are summarized below: [¶] . . . [¶]

"● PM_{10} Maintenance Area[:] [¶] . . . [¶]

"— San Joaquin Valley . . . ."

transferred water would be used for agricultural purposes. . . .'[9] This provides substantial evidence supporting a fair argument that fallowing land may have potential air quality impacts. [District] did not describe or analyze *any* potential air impacts with respect to fallowing land in the [San Joaquin Valley Air Pollution Control District].

"The [initial study]/[negative declaration] also ignores that the Project will fund implementation of conservation measures on farmland within [District's service area]. Nowhere does the document describe the measures that farmers will implement, nor did [District] analyze potential air quality impacts from these measures. The misleading and extremely limited information in the [initial study]/[negative declaration] does not comply with the requirements of CEQA.

"The [initial study]/[negative declaration] checklist provides that the landowners will adhere to regulations, but nowhere does [District] explain what those regulations are, or how they will ensure that the Project does not have significant air quality impacts. This is insufficient to evaluate the Project's potential impacts on air quality. As a result, the Board lacks any information to meaningfully evaluate this potential impact also. [¶] . . . [¶]

"**V. <u>At a minimum [District]'s [initial study]/[negative declaration] is deficient as an information document and [District] must conduct a revised initial study with substantial evidence to support its conclusions.</u>**

". . . [T]he [initial study]/[negative declaration] is deficient and is not supported by substantial evidence. A lead agency cannot 'be allowed to hide behind its own failure to gather relevant data.' [Citation.] The 'burden of environmental investigation' rests with the 'government rather than the public,' and where the lead agency 'has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record.' [Citation.] [District] failed to provide substantial evidence to support[] its conclusions in the [initial study]/[negative declaration], and thus failed to adequately analyze impacts as required by CEQA. [Citation.]"[10] (Fn. omitted.)

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9 The quoted passage is taken from the "**Long-Term Water Transfers** [¶] **Environmental Impact Statement/Environmental Impact Report** [¶] **Final**." (See *ante*, fn. 8.)

10 Where appropriate, we reformatted the citations in the quoted text to conform to the general rules of citation outlined by the California Style Manual. (See generally Cal. Style Manual (4th ed. 2000).)

District responded:

> "The documents provided do not show any environmental impact, let alone a 'significant impact[.]' [¶] . . . [¶]
>
> ". . . The landowners will be required to abide by existing [San Joaquin Valley Air Pollution Control District] regulations for their on-farm improvements on their private property. A copy of the [initial study]/[negative declaration] was sent to the [San Joaquin Valley Air Pollution Control District] for review and no comments were received."

III. Approval.

On March 15, 2016, the Board of Directors, by a vote of three to two, approved the Project. On the same day, a notice of determination was filed and "advise[d] that [District] has approved the . . . [P]roject . . . ." An attached "**Statement of Findings and Determination**" read in part:

> "A Final Finding of a Negative Declaration has been prepared for the . . . Project . . . . The Final Negative Declaration was prepared in compliance with [CEQA] by . . . District . . . . [District] conducted an Initial Study on the proposed Project to evaluate the potential impacts of implementing the [P]roject. No changes were made to the [P]roject as a result of comments made during the public review period (January 20, 2016 to March 14, 2016) . . . . Taking into consideration the entire record, there is no substantial evidence that the Project would have a significant effect on the environment."

An attached "**FINAL NEGATIVE DECLARATION**" read in part:

> "**Finding:**
>
> "There are no significant or adverse impacts to the environment as a result of the Project.
>
> "**Basis for the Finding:**
>
> "Based on the Initial Study prepared for this Project, it was determined that there would be no significant adverse environmental effects resulting from the Project."

IV. Writ petition.

Alliance filed a petition for writ of mandamus pursuant to CEQA and Code of Civil Procedure section 1085. It alleged there was substantial evidence in the administrative record supporting a fair argument that the Project may have a significant effect on biological resources and air quality, inter alia, necessitating an EIR rather than a negative declaration. It also alleged the initial study/negative declaration inadequately described the Project, inter alia, and inadequately described baseline physical conditions. The parties submitted briefs on the matter and the superior court held a hearing on January 18, 2017.

V. Decision and judgment.

In a decision filed on April 3, 2017, the superior court concluded District's negative declaration "is a minimalistic work-product which fails to meet the basic requirements of the law" and "it can be fairly argued on the basis of substantial evidence that the Project in issue may have a significant environmental impact and an EIR is required and a negative declaration cannot be certified." The court reasoned:

> "[District] conflate[s] the legal standard for requiring preparation of an EIR . . . . Preparation of an EIR in lieu of a Negative Declaration is required if there is substantial evidence in the 'whole record' of proceedings that supports a 'fair argument' that a project 'may' have a significant effect on the environment. [Citations.] [¶] . . . [¶] The Courts have held that the fair argument standard is a 'low threshold test.' [Citation.]
>
> ". . . [District] ha[s] focused [its] arguments on the phrase 'substantial evidence' as opposed to whether or not a fair argument exists that a project may have a significant effect on the environment. . . . [¶] . . . [¶]
>
> "Does the Negative Declaration fail to provide a complete and accurate Project description?
>
> ". . . [District] contends the Negative Declaration describes . . . that the Project will involve fallowing and irrigation projects but . . . the first mention of irrigation projects . . . appears in the Appendix. . . . A reader desiring to understand the scope of the Project would have difficulty

understanding the elements of the Project. This issue is not undue parsing but a serious flaw in a supposed attempt to inform the public.

"As [Alliance] contend[s], '[t]he sections of the Negative Declaration purporting to explain the Project never mention irrigation projects, yet the Appendix introduces the irrigation projects as[] "Approved Water [C]onservation Practices" without definitely stating that they are part of the Project['] . . . . [¶] . . . [¶]

"Does the Negative Declaration adequately describe baseline conditions? [¶] . . . [¶]

". . . [Alliance] aver[s] [District] 'w[as] required to provide a description of the environmental setting that allows the reader to have "an understanding of the significant effects of the proposed project and the alternatives.["] ' [Citation.] [¶] . . . [¶]

"Discussion of baseline factors follows:

"a) Air Quality

"The Project comprises in part, fallowing and irrigation projects which will occur in the San Joaquin Valley Air Pollution Control District . . . . [¶] [District] avers that by sending a copy of the Negative Declaration it completed 'consultation' with [the San Joaquin Valley Air Pollution Control] District. The Negative Declaration concluded that the Project would not cause any air quality impacts. However, [Alliance] convincingly argue[s] there will/would be 'construction,' in part, because the Project would include removal and installation of irrigation pipes and installation of tail-water recovery and pump-back systems . . . .

"The Court concedes reasonable minds might differ as to whether or not such events constitute 'construction.' Nevertheless, the Negative Declaration fails to provide any information related to the planned activity related to 'construction.' [¶] . . . [¶]

"c) Baseline Biological Resources

"[Alliance] also aver[s] that [District] fails to provide an adequate baseline for biological resources, including aquatic species.

"A 'sticking point' for [Alliance] is that [District]'s service area covers over 100 square miles and there is no indication of

where idling of land and installation of irrigation projects will occur within the 100 square mile area.

"Further, . . . [District] has not attempted to explain how providing the acreage of the Project and describing the area as providing 'minimal habitat' provides the public with an understanding of the biological resources currently present in the Project area. . . .

"Finally, [Alliance] contends the Negative Declaration does not provide any description of the aquatic species present in the Project area, or their population size. [¶] . . . [¶]

"e) Is [T]here Substantial Evidence of a Fair Argument that the Project May Have Significant and Unmitigated Impacts to Air Quality?

"It is no secret that the Central [V]alley has air quality issues of concern. [Alliance] refer[s] to [the United States] Bureau of Reclamation's EIR for its Long-Term Water Transfers project which explicitly states that fallowing of agricultural land would increase fugitive air emissions and fallowing is the same activity proposed by this Project.

"[District] alleges that fallowing of idle land and possible fugitive air emission is not 'substantial evidence' that the Project may cause significant air quality impacts. . . . [¶] The correct standard, to repeat, requires the production of substantial evidence of a fair argument that the Project may cause such impacts. . . ."[11]

The court issued a peremptory writ of mandamus "commanding [District] to vacate and set aside in its entirety its decision based on its Negative Declaration to approve the Project and further directing [District] to comply with the requirements of CEQA and [the] Guidelines . . . ." Judgment was entered on June 5, 2017.

VI. Motion to vacate judgment.

On May 19, 2017, pursuant to Code of Civil Procedure section 663, District moved to vacate the judgment and the peremptory writ of mandamus. It argued:

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11 See *ante*, footnote 10.

> "Due to the date of the Court's ruling, the ruling has no practical impact nor can it provide effective relief. [Alliance's] prayer requests the Court prevent [District] from implementing the Pro[ject] pending full compliance with the requirements of CEQA . . . . As a practical matter the Court is unable to provide [Alliance] with the relief requested. The Pro[ject] was approved on March 15, 2016, for a single year. On March 15, 2017, after the Court took the matter under submission, but prior to the judgment (April 17, 2017), the Pro[ject] ended and the approval of the negative declaration was no longer in effect. Thus, as of March 15, 2017, the Pro[ject] in dispute ceased to exist, the approval was no longer in place and the relief requested was no longer available."

The court denied the motion:

> "Based upon a review of the parties' pleadings, the Court finds that the underlying matter is not moot and therefore it has not lost jurisdiction to render a decision. . . . Alliance sought an order from this Court 'commanding [District] to **vacate and set aside in its entirety its decision to approve the Project**' and 'directing [District] to comply with the requirements of CEQA . . . .' . . . To date, the Court is unaware that [District] has taken any action to 'vacate and set aside' its decision to approve the Project. Indeed, it appears to be continuing in its 'implementation' of the Project to the extent that it is reimbursing Project Participants for improvements undertaken as a result of their participation.[12] Thus, retaining the judgment requiring [District] to set aside adoption of the Negative Declaration would provide [Alliance] with 'effective relief' even if the Project has ended.
>
> "Additionally, even if the Project were indeed over and done with, as [District] contends, the Court specifically finds that two exceptions to 'mootness' exist here. First, the matter encompassed by the litigation . . . is indisputably one of broad public interest . . . . Second, the Court does consider that the instant Project . . . may be the type of Project which reoccurs, but due to the short time-frame intentionally encompassed by the Project, evades legal review."

The order denying said motion was entered on July 26, 2017.

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12 In its opposition to District's motion, Alliance pointed to a May 31, 2017, form letter, in which District pledged "to work with . . . [P]ro[ject] participants to make them whole for reasonable fees, costs and damages incurred last year" "as a result of [their] involvement in the . . . Pro[ject]."

DISCUSSION

I. CEQA overview.

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112 (*Mountain Lion*), citing § 21001.) The statute "contains a 'substantive mandate' requiring public agencies to refrain from approving projects with significant environmental effects if 'there are feasible alternatives or mitigation measures' that can substantially lessen or avoid those effects." (*County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 98, italics omitted, quoting *Mountain Lion, supra,* at p. 134; accord, §§ 21002, 21081.) A " '[s]ignificant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (Guidelines, § 15382.)

"Whenever a project may have a significant and adverse physical effect on the environment, an EIR must be prepared and certified." (*Mountain Lion, supra,* 16 Cal.4th at p. 113, citing § 21100, subd. (a); accord, § 21151, subd. (a); see *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309 (*Sundstrom*) [" '[T]he word "may" connotes a "reasonable possibility." ' "].) The EIR "is the mechanism prescribed by CEQA to force informed decision making and to expose the decision making process to public scrutiny." (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 910.) As " 'the heart of CEQA' " (*Laurel Heights, supra,* 47 Cal.3d at p. 392, quoting Guidelines, § 15003, subd. (a)), the EIR "provides the public and responsible government agencies with detailed information on the potential environmental consequences of an agency's proposed decision" (*Mountain Lion, supra,* at p. 113).

" 'CEQA excuses the preparation of an EIR and allows the use of a negative declaration when an initial study shows that there is no substantial evidence that the project may have a significant effect on the environment.' [Citations.]" (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 270; accord, § 21080, subd. (c); Guidelines, § 15070, subd. (a).) " 'Negative declaration' means a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." (§ 21064; accord, Guidelines, § 15371.)

II. There is substantial evidence in the administrative record supporting a fair argument that the Project may have a significant effect on the environment.

a. *Standard of review*.

"When a court reviews an agency's decision to certify a negative declaration, the court must determine whether substantial evidence supports a 'fair argument' that the project may have a significant effect on the environment." (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1579 (*County Sanitation*); see §§ 21080, subds. (c), (d); 21151.) "The fair argument test is routinely described as 'a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review.' [Citation.]" (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 282 (*Nelson*).) "A logical deduction from the formulation of the fair argument test is that, if substantial evidence establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR." (*County Sanitation, supra,* at p. 1580; see Guidelines, § 15064, subd. (f)(1).) "Stated another way, if the . . . court perceives substantial evidence that the project might have such an impact, but the agency failed to secure preparation of the required EIR, the agency's action is to be set aside because the agency abused its discretion by failing to

proceed 'in a manner required by law.' " (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002, quoting § 21168.5.)

" 'Substantial evidence' . . . means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).) It is not "overwhelming or overpowering evidence." (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 152.) "CEQA does not impose such a monumental burden . . . ." (*Ibid.*) Substantial evidence "includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (§ 21080, subd. (e)(1); accord, Guidelines, § 15384, subd. (b).) "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (Guidelines, § 15384, subd. (a); accord, § 21080, subd. (e)(2).)

"The determination by an appellate court under the fair argument test involves a question of law decided independent of any ruling by the superior court." (*County Sanitation, supra*, 127 Cal.App.4th at p. 1579.) "Thus, we independently review the record and determine whether there is substantial evidence in support of a fair argument that the proposed project may have a significant environmental impact, while giving the lead agency the benefit of a doubt on any legitimate, disputed issues of credibility.[13]" (*Nelson, supra*, 190 Cal.App.4th at p. 282.)

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13 However, "before an agency may rely on its purported rejection of evidence as incredible, it must first identify that evidence with sufficient particularity to allow the reviewing court to determine whether there were legitimate, disputed issues of credibility." (*County Sanitation, supra*, 127 Cal.App.4th at p. 1597, fn. omitted; see, e.g., *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 582 [administrative record included city council's statement that expert was not credible due to misrepresentations he made in earlier proceedings].) This prerequisite "assist[s] courts in distinguishing between after-the-fact justifications and situations where a question of credibility was

b. *Analysis.*

We conclude there is substantial evidence supporting a fair argument that the Project may have a significant effect on biological resources and air quality.

i. Biological resources.

"Comments from public agencies that are within their area of expertise can constitute substantial evidence supporting a fair argument that a project may have a significant effect on the environment." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2018) § 6.43, p. 6-49/50 (rev. 3/17);[14] see, e.g., *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1425 [comments by city and county officials on vehicle traffic, noise levels, and air quality]; *County Sanitation*, *supra*, 127 Cal.App.4th at pp. 1586-1587 & see p. 1557, fn. 2 [comments by county and municipal sanitation agencies on sewage sludge]; *Stanislaus Audubon Society, Inc. v. County of Stanislaus*, *supra*, 33 Cal.App.4th at p. 156 [comments by California Department of Conservation on growth-inducing impacts].)

Here, District received a letter from California Department of Fish and Wildlife, a trustee agency that has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. (Fish & G. Code, § 1802; Guidelines, § 15386, subd. (a).) Pursuant to

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legitimate and actually addressed by the agency . . . ." (*Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 208.)

To the extent District asserts certain evidence in the instant case should be regarded as incredible and ignored when applying the fair argument standard, such a claim must be rejected since District "has provided no citations to the record of proceedings showing . . . [it] addressed the credibility of [the] evidence presented." (*Consolidated Irrigation Dist. v. City of Selma*, *supra*, 204 Cal.App.4th at p. 208.)

14 The practice guide authored by Stephen L. Kostka and Michael H. Zischke has been cited by our high court and other appellate districts. (See, e.g., *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 937-938, 940, fn. 17, 949.)

section 1802 of the Fish and Game Code, California Department of Fish and Wildlife "shall consult with lead and responsible agencies and shall provide, as available, the requisite biological expertise to review and comment upon environmental documents and impacts arising from project activities, as those terms are used in [CEQA]." According to California Department of Fish and Wildlife, the District's service area "[is] known to support several species which are considered threatened or endangered under the California Endangered Species Act . . . and/or federal Endangered Species Act . . . , and other special status species . . . ." The Swainson's hawk and California tiger salamander, inter alia, "have been documented within" its boundary. "Pasture and alfalfa are examples of crop types that provide suitable foraging habitat for Swainson's hawk during the nesting and non-nesting season in California's Central Valley" and "pasture, non-native grassland, and vernal pool habitat" may "contain[] suitable [California tiger salamander] breeding and upland habitat." The record demonstrates numerous Project applicants intended to idle lands that had been used for pasture and alfalfa.[15]

California Department of Fish and Wildlife also revealed "[a]erial photographs show that suitable upland refugia and wetland breeding habitat for [California tiger salamander] exists within the Project site" and "[t]he California Natural Diversity Database . . . has occurrence records located within [District's service area] boundary." California Department of Fish and Wildlife advised the California tiger salamander

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[15] The administrative record contains 70 "**On-Farm Conservation Funding Program – Solicitation of Interest Form[s]**." District's March 15, 2016, Board Agenda Report, which is also included in the record, summarized:

> "As of Wednesday, March 9[th], [District] has received Solicitation of Interest Forms covering 96 parcels for a total of 3,632 acres that have shown an interest in the Pro[ject]. [¶] . . . [¶]
>
> "Of the 96 parcels, 67 are converting to permanent crops."

Many applicants indicated they would idle land that had been used for pasture or alfalfa.

"could be potentially impacted if ground disturbance . . . were to occur as the result of the Project and the appropriate avoidance, minimization, and mitigation measures are not implemented." District's initial study/negative declaration, however, made no mention of "the potential for the[se] . . . species to occupy the site" and concluded the lands within its service area "provide minimal habitat for terrestrial species" and "[w]ildlife that use agricultural lands are not anticipated to be adversely affected." California Department of Fish and Wildlife pointed out, "absent the completion of essential biological assessments and surveys to determine which species have the potential to occupy or use the Project site, it is not clear how [District] can conclude that biological resources are either not present or that measures proposed are adequate to reduce impacts to less than significant." Thus, at a minimum, California Department of Fish and Wildlife "recommend[ed] a new CEQA document be prepared and re-circulated for review once adequate surveys and impact analyses have been completed to determine what measures would mitigate potential effects of the Project."

In its response to California Department of Fish and Wildlife's letter, District essentially admitted biological surveys were never conducted and ground disturbance would result from the implementation of water conservation measures, which could include new pipelines; laser land leveling; tail-water recovery or pump-back systems; land conversions from high water use crops to lower water use crops; conversion to higher efficiency irrigation systems; and/or lowering, replacing, or deepening domestic wells impacted by the recent drought. (See *ante*, at p. 9.) However, District ceded responsibility for obtaining the pertinent surveys to the landowners participating in the Project. (See *ante*, at p. 15.) "[U]nder CEQA, the lead agency bears [the] burden to investigate potential environmental impacts." (*County Sanitation*, *supra*, 127 Cal.App.4th at p. 1597; see *Sundstrom*, *supra*, 202 Cal.App.3d at p. 311 ["CEQA places the burden of environmental investigation on government rather than the public."].) "If the local agency has failed to study an area of possible environmental impact, a fair

argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom*, *supra*, at p. 311; accord, *County Sanitation*, *supra*, at p. 1597.) We will not allow District "to hide behind its own failure to gather relevant data." (*Sundstrom, supra*, at p. 311.)

On appeal, District argues California Department of Fish and Wildlife's comments "amount to nothing more than a suggestion to investigate further . . . ." We disagree. California Department of Fish and Wildlife highlighted District's failure to investigate at the outset the presence of threatened, endangered, or special status species in its service area, which undermined the initial study/negative declaration's analysis of the Project's potential effects on biological resources, and called upon District to start over and undertake a proper CEQA review.

ii. Air quality.

In the initial study/negative declaration, District's sparse discussion of the Project's potential impact on air quality focused solely on the release of water from Goodwin Dam. Because this release would be "part of normal operations" and "not require new construction," District concluded "[t]here would be no emission of criteria pollutants that would cause detectable changes to the baseline conditions or exceed federal, State, and local thresholds" for the area. It later added "[t]he transferred water would be utilized by [real parties in interest] . . . on existing farmland that is currently under agricultural production" and "would not cause an increase in air pollutants."

In their comment letter, Brichetto and Frobose, both of whom are area residents and farmers (see *ante*, fn. 1), pointed out the analysis "ignore[d] that the Project will fund implementation of [water] conservation measures on farmland" within District's service area. (See *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 ["Relevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument."].) As noted, these measures are part of the

Project and could include new pipelines; laser land leveling; tail-water recovery or pump-back systems; land conversions from high water use crops to lower water use crops; conversion to higher efficiency irrigation systems; and/or lowering, replacing, or deepening drought-affected domestic wells. It is reasonable to infer the implementation of these measures could involve new construction and the emission of criteria pollutants. (See Guidelines, § 15384, subd. (a).) Brichetto and Frobose also pointed out District "did not describe or analyze *any* potential air impacts with respect to fallowing land in the" San Joaquin Valley Air Pollution Control District. They cited a "**Long-Term Water Transfers [¶] Environmental Impact Statement/Environmental Impact Report [¶] Final**" prepared by the United States Department of the Interior Bureau of Reclamation Mid-Pacific Region and one of the real parties in interest in the instant case (i.e, the San Luis & Delta-Mendota Water Authority) in March 2015. The subject of that document was a project involving cropland idling in, among other places, the San Joaquin Valley. An analysis concluded cropland idling "would affect air quality in the area of analysis," namely by "increase[ing] fugitive dust emissions." (See *Sierra Club v. California Dept. of Forestry & Fire Protection, supra*, 150 Cal.App.4th at p. 382 [references to other projects in the same general area may constitute relevant evidence].) It is reasonable to infer from this information the Project's fallowing component could have a similar impact on air quality. (See Guidelines, § 15384, subd. (a).) Once again, District cannot "hide behind its own failure to gather relevant data" (*Sundstrom*, *supra*, 202 Cal.App.3d at p. 311) and deficiencies in the record "enlarge the scope of fair argument" (*ibid.*).

In its response to Brichetto and Frobose's letter, District mentioned it provided the initial study/negative declaration to San Joaquin Valley Air Pollution Control District but did not receive any feedback. It raises this point on appeal. Assuming, arguendo, San Joaquin Valley Air Pollution Control District's silence constituted affirmative testimony the Project would have no significant effect on air quality, under the fair argument test, if substantial evidence establishes a reasonable possibility of a significant environmental

impact, then the existence of contrary evidence is not adequate to support a decision to dispense with an EIR. (*County Sanitation, supra,* 127 Cal.App.4th at p. 1580.)

III. District's initial study/negative declaration was defective.

"Reviewing courts also examine whether the agency's decision to adopt a negative declaration is based on a factual analysis of the project's potential impacts. . . . The agency's decision can be invalidated if it appears the agency did not actually evaluate the question whether significant effects might result." (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 6.75, p. 6-74 (rev. 3/18); see, e.g., *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 408; see also *Sundstrom, supra*, 202 Cal.App.3d at p. 311 ["While a fair argument of environmental impact must be based on substantial evidence, mechanical application of this rule would defeat the purpose of CEQA where the local agency has failed to undertake an adequate initial study."].)

a. *District's initial study/negative declaration did not sufficiently describe the Project as a whole.*

" 'Generally, an agency will prepare an initial threshold study to gather information necessary to determine whether to prepare an EIR or a negative declaration. The initial study must include a description of the project.' [Citation.]" (*Nelson, supra,* 190 Cal.App.4th at p. 267.) For the purposes of CEQA, "project" means "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ." (Guidelines, § 15378, subd. (a).) "The entirety of the project must be described, and not some smaller portion of it." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654; see 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 6.31, p. 6-25 (rev. 3/17) ["An initial study that fails to describe the entire project is fatally deficient . . . ."].)

"The negative declaration is inappropriate where the agency has failed . . . to provide an accurate project description . . . . An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency's action. 'Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance.' " (*City of Redlands v. County of San Bernardino*, *supra*, 96 Cal.App.4th at p. 406, fns. omitted; see 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 12.7, p. 12-7 (rev. 3/18) ["The adequacy of . . . [a] project description is closely linked to the adequacy of the . . . analysis of the project's environmental effects. If the description is deficient because it fails to discuss the entire project, the environmental analysis will likely reflect the same mistake."].)

In Section 1.2 of the initial study/negative declaration, titled "**Purpose and Need/Project Objectives**," District noted the transfer of saved water to the real parties in interest would secure funds for fallowing landowners to "implement on-farm water conservation methods." In Section 1.3, titled "**Scope/Project Location and Setting**," District stated these "water conservation measures" would be "implemented as part of the Proposed Project . . . on land within" its service area." However, the project description in Section 2.2, titled "**Proposed Project**," only provided information about the water transfer; it did not identify, let alone discuss, the water conservation measures to be carried out. While the neutral phrase "water conservation measures" sporadically appears in subsequent sections, the actual measures themselves—i.e., new pipelines, laser land leveling, tail-water recovery or pump-back systems, land conversions from high water use crops to lower water use crops, conversion to higher efficiency irrigation systems, and lowering, replacing, or deepening drought-affected domestic wells—were

enumerated collectively for the first time in an appendix. (See *ante*, at p. 9.)[16] Although District itself conveyed such measures were "part of" the Project and later admitted their implementation would result in ground disturbance (see *ante*, at p. 29), it nonetheless saw fit to exclude them from the project description; unsurprisingly, subsequent analyses of their effects on the environment, if any, was minimal. (See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729-730 ["Sewer expansion was recognized by the [draft EIR] as necessary to the [residential development] project, yet was excluded from the description of the development project and its effects ignored in the [final EIR]. The [final EIR] was thus premised on an improperly 'curtailed' and 'distorted' project description."].) This glaring omission " 'draws a red herring across the path of public input.' [Citations.]" (*Silveira v. Las Gallinas Valley Sanitary Dist.* (1997) 54 Cal.App.4th 980, 990; see *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 ["The data in an EIR . . . must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. '[I]nformation "scattered here and there in EIR appendices," or a report "buried in an appendix," is not a substitute for "a good faith reasoned analysis . . . ." ' "].)

b. *District's initial study/negative declaration did not sufficiently describe baseline physical conditions.*

"Under CEQA, a public agency must determine what, if any, effect on the environment a proposed project may have. To do so, a public agency must first make a fair assessment of existing physical conditions (i.e., baseline physical conditions) and then compare it to the anticipated or expected physical conditions were the project to be completed, thereby allowing the agency to focus on the nature and degree of changes

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16 District does briefly discuss land conversions in Section 3.4 of the initial study/negative declaration, titled "**Socioeconomics**."

expected in those physical conditions after the project and whether those changes result in any significant effect on the existing environment." (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1037, citing Guidelines, § 15125, subd. (a).)[17] "Without such a comparison, [an initial study] will not inform decision makers and the public of the project's significant environmental impacts, as CEQA mandates." (*Communities for a Better Environment v. South Coast Air Quality Management Dist.*, *supra*, 48 Cal.4th at p. 328.)

Here, baseline physical conditions set forth in District's initial study/negative declaration omitted "relevant specifics" (Guidelines, § 15126.2, subd. (a)) that would have permitted the potential effects of the Project on biological resources and air quality "to be considered in the full environmental context" (*id.*, § 15125, subd. (c)). With respect to biological resources, the initial study/negative declaration did not identify any of the threatened, endangered, or special status species documented to have been found within District's service area. (See *ante*, at pp. 27-30.) With respect to air quality, though the initial study/negative declaration determined "[t]here would be no emission of criteria pollutants that would cause detectable changes to the baseline conditions," it

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17 Guidelines section 15125, subdivision (a), provides:

> "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."

"Although [Guidelines section 15125] refers specifically to the analysis in an EIR, the agency determination it addresses—'whether an impact is significant'— also arises at the initial study phase of CEQA review, when the agency must decide whether there are any significant environmental effects requiring assessment in an EIR. . . . [T]he regulation is thus equally applicable at this phase." (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320-321, fn. 5.)

failed to disclose exactly what constituted these baseline conditions. (See *ante*, at pp. 30-32.) "Due to the inadequate description of the environmental setting . . . , a proper analysis of [the] [P]roject['s] impacts was impossible." (*Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1122.)

c. *Prejudice*.

" '[F]ailure to disclose information called for by CEQA may be prejudicial "regardless of whether a different outcome would have resulted if the public agency had complied" with the law [citation].' [Citation.] On the other hand, 'there is no presumption that error is prejudicial.' [Citation.] 'Insubstantial or merely technical omissions are not grounds for relief. [Citation.] "A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the [review] process." ' [Citations.]" (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 942.) "The burden is on the agency to establish lack of prejudice." (*North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 670.)

The abovementioned omissions in the initial study/negative declaration were neither insubstantial nor merely technical. They led to an insufficient evaluation of the Project's potential environmental impacts on biological resources and air quality, depriving the public of a full understanding of the issues raised by the Project.

IV. The superior court's denial of District's vacation motion was not improper.

Code of Civil Procedure section 663 "empowers a trial court, on motion of '[a] party . . . entitl[ed] . . . to a different judgment' from that which has been entered, to vacate its judgment and enter 'another and different judgment.' " (*Forman v. Knapp Press* (1985) 173 Cal.App.3d 200, 203.) "A motion to vacate under [Code of Civil Procedure] section 663 is a remedy to be used when a trial court draws incorrect conclusions of law or renders an erroneous judgment on the basis of uncontroverted evidence." (*Simac Design, Inc. v. Alciati* (1979) 92 Cal.App.3d 146, 153.) "In ruling on

a motion to vacate the judgment the court cannot ' "in any way change any finding of fact." ' [Citation.]" (*Glen Hill Farm, LLC v. California Horse Racing Bd.* (2010) 189 Cal.App.4th 1296, 1302.)

On appeal, District contends this matter is moot because its approval of the Project expired on or about March 14, 2017. Assuming, arguendo, this matter is technically moot, we conclude the superior court's denial of District's vacation motion was not improper. "[T]here are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination [citation]." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480.) A reviewing court is "required to uphold [a discretionary] ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32, citing *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.) The instant case concerns the applicability of CEQA's EIR requirement, which is recognized as "the heart of CEQA." (Guidelines, § 15003, subd. (a); see *Watershed Enforcers v. Department of Water Resources* (2010) 185 Cal.App.4th 969, 978 ["The . . . scope of application of a statute would typically be a matter of general public interest."].) As noted, "an EIR must be prepared and certified" "[w]henever a project may have a significant and adverse physical effect on the environment." (*Mountain Lion, supra*, 16 Cal.4th at p. 113.) "The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern." (§ 21000, subd. (a).) Hence, questions relating to the preservation of biological resources and air quality "constitute important issues of broad public interest that are likely to reoccur." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203; cf. *ibid.* [urban decay and cumulative environmental impacts].) The Project's one-year duration also militates in favor of

appellate review. (Cf. *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069 ["The annual nature of the [public agency's] pesticide renewal program virtually ensures that litigation seeking mandamus relief against a registration renewal will not be resolved before the next annual renewal occurs" and "creates an impossible burden for those seeking to challenge the [agency]'s decisions."].) Finally, in view of the overall circumstances, "it is likely that there may be a recurrence of the same controversy between the parties . . . ." (*Cucamongans United for Reasonable Expansion*, *supra*, at p. 480.)

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents Oakdale Groundwater Alliance, Louis F. Brichetto, and Robert N. Frobose.

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DETJEN, J.

WE CONCUR:

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HILL, P.J.

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FRANSON, J.